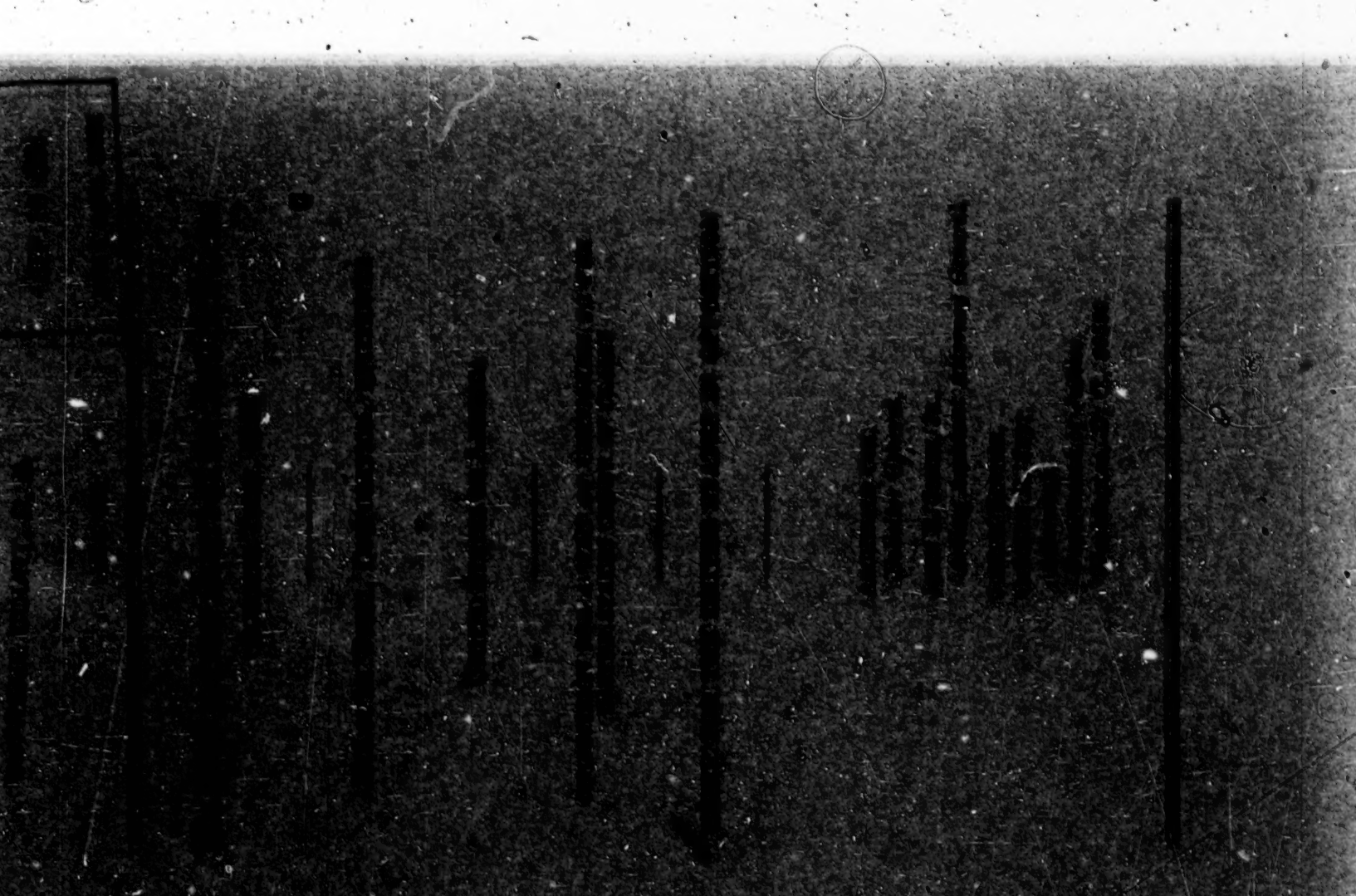

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 393

MCLOUTH STEEL CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 255-262, Pet. 13-22), is reported at 319 F.2d 167.

JURISDICTION

The judgment of the Court of Claims was entered June 7, 1963. (R. 255, 262, Pet. 13, 22.) The petition for a writ of certiorari was filed on August 22, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

In 1953 the taxpayer issued and sold to two insurance companies two "First Mortgage 4¼% Sinking Fund Bonds" totalling $56,000,000, which were in registered form, numbered serially, issued under a purchase and loan agreement, and secured by property of the taxpayer under a trust indenture with an independent trustee. The question presented is whether the instruments are subject to the documentary stamp tax imposed by Sections 1800 and 1801 of the Internal Revenue Code of 1939.

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code of 1939 (26 U.S.C., 1952 ed.):

> SEC. 1800. IMPOSITION OF TAX.
>
> There shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in sections 1801 to 1807, inclusive, or for or in respect of the vellum, parchment, or paper upon which such instruments, matters or things, or any of them, are written or printed, the several taxes specified in such sections.
>
> SEC. 1801. [As amended by Sec. 521(a)(3) of the Revenue Act of 1941, c. 412, 55 Stat. 687, 706.] CORPORATE SECURITIES.
>
> On all bonds, debentures, or certificates of indebtedness issued by any corporation, and all instruments, however termed, issued by any corporation with interest coupons or in registered

form, known generally as corporate securities, on each $100 of face value or fraction thereof, 11 cents: *Provided*, That every renewal of the foregoing shall be taxed as a new issue * * *.

Treasury Regulations 71 (1941 ed.):

SEC. 113.50. *Scope of Tax.*—Section 1801 imposes a tax upon the issue by any corporation of bonds, debentures, certificates of indebtedness, and all instruments, however termed, with interest coupons or in registered form and known generally as corporate securities. Every renewal of the above described instruments is taxable as a new issue.

SEC. 113.55. *Issues Subject to Tax.*—Ordinarily, a corporate instrument styled a bond, debenture, or certificate of indebtedness is subject to the tax. However, the taxability of an instrument is not determined by the name alone but depends upon all the circumstances, such as the name, form, and terms of the instrument, etc. Hence, an instrument, however designated, having all the essential characteristics of a bond, debenture, or certificate of indebtedness is taxable as such. Similarly, an instrument issued with interest coupons, or with provision for registration, and coming within the class known generally as corporate securities will be held subject to the tax regardless of the name by which it may be called.

* * * *

STATEMENT

The undisputed facts are summarized by the court below (Pet. 13-15) as follows:

On or about June 25, 1953, the taxpayer borrowed a large amount of money with the intent of expanding its steel production facilities. The larger portion of this debt was evidenced by two instruments each labelled a "First Mortgage 4¼% Sinking Fund Bond", identical in terms except as to amount and payee: one, with a face value of $30,000,000 numbered No. R 000001, was issued to the Metropolitan Life Insurance Company; the other, with a face value of $26,000,000, numbered No. R 000002, was issued to the Prudential Insurance Company of America. They were issued in the name of the respective insurance companies and registered with the borrower, McLouth. The instruments are formal documents, printed on a steel engraved border; and issued under the seal of the taxpayer.[1] (Pet. 14.)

Each instrument has a maturity of 19½ years and carries interest of 4¼% on the unpaid balance, payable semi-annually. Each of these bonds was sold under a purchase and loan agreement executed between the taxpayer and the insurance companies, the agreements being identical except for the name of the insurance company and the amount of the debt. (R. 5-18.) The bonds were secured by property of the taxpayer under an "Indenture of Mortgage and Deed of Trust", executed between the taxpayer and the National Bank of Detroit, as trustee. The taxpayer has the right to redeem the bonds at any time upon the payment of a stipulated premium. The insurance companies have the right to demand that the taxpayer

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[1] A facsimile of the two bonds is found at R. 44-47.

exchange their originally issued Sinking Fund Bonds for registered or coupon bonds in the same aggregate principal amount but in smaller denominations. The indenture agreement sets forth the sinking fund provisions and imposes substantial restrictions upon the taxpayer's right to incur additional indebtedness and to pay dividends. (Pet. 14-15.)

At the time of the issuance of the instruments in 1953, the taxpayer purchased and affixed stamps in the aggregate amount of $61,600. However, after the decision of the Supreme Court in *United States* v. *Leslie Salt Co.*, 350 U.S. 383 (1956), the taxpayer brought suit for a refund, asserting that the instruments were not covered by the statute. (Pet. 14.) The court below (per Reed, J.) granted the government's motion for summary judgment, holding that the taxpayer's Sinking Fund Bonds contain all the normal features of a corporate bond, in addition to the usual title, formal appearance and provisions, and, therefore, that the taxpayer's Sinking Fund Bonds were taxable as "bonds" and as "corporate securities" within the meaning of Sections 1800 and 1801 of the Internal Revenue Code of 1939. (Pet. 13-22.)

ARGUMENT

The decision below is correct. There is no conflict or other reason warranting further review.

The evidences of indebtedness in this case are in form and substance corporate bonds, plainly subject to the stamp tax under the literal terms of the statute imposing the tax upon "all bonds * * * issued by any

corporation".[2] The taxpayer's reliance upon *United States* v. *Leslie Salt Co.*, 350 U.S. 383, is misplaced, since that case involved an instrument in the form of a promissory note, which this Court held was within the exemption of promissory notes from the documentary stamp tax. The taxpayer's contention that the stamp tax does not apply to corporate bonds unless they are one of a series of bonds issued under an open-end indenture, has no basis in the statute, the Regulations, or the *Leslie Salt* decision. The fact that corporate obligations issued in such large denominations are not readily marketable is not relevant in the case of a bond which is on its face a marketable instrument. *United States* v. *Isham*, 17 Wall. 496.

The taxpayer's claim of conflict is wholly without substance. *Standard Packaging Corp.* v. *United States*, 197 F. Supp. 788 (Minn.), is a district court decision holding a debenture subject to tax, while *Anderson* v. *Akers*, 7 F. Supp. 924 (W.D. Ky.), affirmed in part and reversed in part sub nom. *Atherton* v. *Anderson*, 86 F. 2d 518 (C.A. 6), involved a wholly different question of whether bonds were legal investments for a national bank. Cf. *United States* v. *Regal Loan Co.*, 61 F. Supp. 436 (E.D. Mo.), affirmed, 154 F. 2d 556 (C.A. 8).

The issue lacks importance, since it is confined to the tax on the issuance of corporate obligations in the form of a bond purchased by large investors before the *Leslie Salt* decision. Since that decision, most

[2] The court below found that the instruments were also within the statutory description of corporate securities.

loans privately placed have been cast in the form of promissory notes.

CONCLUSION

For the reasons stated, the taxpayer's petition for certiorari should be denied.

Respectfully submitted.

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SEPTEMBER, 1963.

The Internal Revenue Service informally advises us that there are now no pending cases involving documentary stamp taxes on corporate bonds issued after the *Leslie Salt* decision (1956). According to data furnished by the Securities and Exchange Commission, for the year 1960, of the 968 debt issues for which the Securities and Exchange Commission had records of whether or not the documentary stamp tax had been paid, 684 of the issues were called notes. A documentary stamp tax was paid on only about 25 percent of the 968 debt issues. The total proceeds of the instruments entitled promissory notes which were issued in 1960 and for which the Securities and Exchange Commission had records of payment or non-payment of the documentary stamp tax was 2.28 billion dollars and of this no documentary stamp tax was paid on 2.193 billion dollars of instruments.

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